IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 518

DAVID FRIEDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITONER

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THE BURDEN OF PROOF

The question presented under this topic is whether the record, minus the Clager testimony, contains sufficient evidence to permit the trial court to submit the case for jury determination. There is no question of weighing the evidence, as in *Glasser* v. *United States*, 315 U. S. 60, 80. Rather, the question is whether the evidence in this case, less the purported testimony of Clager, permits a reasonable person fairly to conclude guilt beyond a reasonable doubt, giving full play to the proper functions of the jury.

Curley v. *United States*, 160 F. (2d) 229, 232. (C. A. D. C.), certiorari denied, 331 U. S. 837.

The contention of petitioner is that the evidence produced by the prosecution, without Clager's opinion testimony, was too speculative and too remote to permit a jury to make a determination. Petitioner analyzed this evidence; he did so not to weigh it, but to show how speculative it was, how many inferences it was susceptible to, and how remote in point of time it was, solely for the purpose of illustrating that this evidence fails to meet the net worth test set forth in *Bryan* v. *United States*, 175 F. (2d) 223, 227 (C. A. 5):

> "The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant.",

and in *United States* v. *Fenwick*, 177 F. (2d) 488, 490 (C. A. 7):

> "Evidence of mere probability of guilt, of course, is not sufficient."

Respondent recognized the remoteness of the evidence from the net worth starting point, by reverting to the long-discredited "Friedberg Loan" theory of concealment. Respondent attempts to fill the hitherto empty gap of several years' space by pointing out with suspicion that petitioner's wife kept his books from November 30, 1944, to the trial. But the sole charge which respondent places against her work is the use of the "Friedberg Loan" account. This suggestion of wrong-doing completely ignores that Clager, the star witness for the prosecution, admitted that all of the "Friedberg Loan" funds were reported as income, and that actually, there was probably an overstatement of income (R. 309, 396, 399-400).

Respondent relies chiefly on bald statements as to proof of the net worth starting point from admissions of defendants, general statements regarding financial condition,

business records, or specific conduct, and lists citations. But the question which petitioner presents is whether the speculative nature and the remoteness of the instant evidence do not require a reversal by this Court. That is the conflict which the respondent states it cannot find. *Bryan* v. *United States*, supra, and *United States* v. *Fenwick*, supra, create the conflict. *United States* v. *Caserta*, 199 F. (2d) 905 (C. A. 3), at page 907, described the conflict:

> "The cases show, however, a rather *surprising rule* that when the discrepancy between increased net worth and reported income is shown, the *burden of explanation shifts to the taxpayer*, at the same time repeating the usual criminal law rule that the burden throughout a criminal case is *upon the prosecution*." (Emphasis ours.)

And the Chief Judge of the Court of Appeals for the Fifth Circuit warned of the serious and basic nature of the conflict, and of the need for guidance from this Court:

> "This court and other courts have, in many cases, "(listing citations)" pointed out the dangers attending trials conducted in this way. Some of them have at times seemed to be more concerned with easing the difficulties attending the proof of guilt by this method than with preserving unimpaired the constitutional rights of a defendant, the fundamental safeguards and guarantees of his liberty. Most of the courts, however, confronted with the situation which this kind of case presents have withstood all attacks upon, and have held fast to, constitutional principles, including the fundamental premise upon which criminal trials proceed, that the defendant is presumed innocent until his guilt is established by legal or admissible evidence beyond a reasonable doubt." *Demetree* v. *United States*, 207 F. (2d) 892, 894 (C. A. 5).

THE OPINION TESTIMONY OF CLAGER

Respondent bases its position here on three assumptions, which petitioner will show to be unfounded.

First respondent contends that defense counsel opened the door to the opinion testimony through cross-examination. Petitioner contends that the simple question "Did you credit Friedberg with cash in 1941?" does not require or justify the lengthy explanation which spilled forth from Clager. But even if an explanation were justified, Clager's response was not an explanation, and is grossly improper and prejudicial for other reasons. The factual evidence and testimony ended with the loan application of November 30, 1939. Clager attempted to fill the gap between this date and December 31, 1945, a period of over six years (when cash was first credited), by testifying that he made an investigation which "disclosed no evidence which would permit me to put such a figure of currency in my schedule." (R. 371) Clager did *not* testify as to *what he did, what, when, or where he investigated, to whom he talked, or what he discovered.* He merely said he investigated, and that he *concluded* that there was no cash. This is the ultimate in hearsay, culminating in pure conclusion. An argument such as the District Attorney might make in summation was presented to the jury through the lips of a witness, as if it were factual testimony.

In addition, it is assumed that Clager was an expert accountant, while his own testimony is to the contrary (R. 366, 367, 373, 376).

And finally, it is contended that the issue of cash or currency on hand at the starting point was not the ultimate fact for the jury to determine. Perhaps the size of the record caused the respondent to forget that every figure on the net worth statement (Ex. 2) was stipulated to, except the failure to credit petitioner with cash on hand prior to

December 31, 1945 (R. 172, 343). Cash was the sole factual issue.

The admission of this testimony exemplifies the cause for Judge Hutcheson's alarm.

THE SUPPLEMENTAL INSTRUCTION

Respondent concedes the rule in *Screws* v. *United States*, 325 U. S. 91, 107, but argues that such a rule does not apply to the instant case for three reasons. The instruction was impartial, no objection was raised, and no attempt was made to influence the judgment of the jury. Of course, a request to compromise, unless the jury intended to compromise, does have some influence on its judgment. Also, the question of partiality seems obvious. Friedberg was convicted in part, and acquitted in part. Compromise is not impartiality.

The only serious issue is raised by the failure to object. The waiver by defense counsel of a ground of error neither strengthens nor weakens his previous failure to object to the same error. An affirmative waiver of error carries no more weight than a negative refusal to voice an objection. Counsel is not invested with any authority to double the effect of his failure to object. The life or liberty of an accused should not depend on a distinction between a positive and a negative act of counsel. Petitioner will not burden the Court by re-stating the cases cited in the previous brief, which hold that a failure to except to a supplemental instruction does not prevent a reviewing court to apply Rule 52 (b) of the Federal Rules of Criminal Procedure, despite the provisions of Rule 30. It is sufficient to point out that the respondent bases its position on the rule that a trial court should have the opportunity to correct its own errors. But here, during argument on a motion for a new trial, only one week later, the trial court

clearly recognized the error, and five times asked defense counsel if such error was to be pressed. The trial court had ample opportunity to correct its error, which error was urged in the brief on the motion for a new trial (R. 1163). When counsel retreated from the stand taken in his brief, the court then proceeded with full deliberation to overlook the error. However, the trial court evidently felt some remorse about its inaction. For three months later, at the sentencing, it said:

> ". . . , and if the Court committed any error in its instructions, *an upper court will have to determine that fact.* (Emphasis ours.)

This treatment is another example of the procedure in net worth cases which is complained of in *Demetree* v. *United States*, supra, The chief interest of an increasing number of courts is to facilitate the collection of taxes, even if the rights of the taxpayer be impaired.

This is the only case petitioner has found wherein a jury is told "to compromise and adjust your differences" (R. 1146). It is the only case petitioner has found, where the charge was sustained, wherein members of the jury were not specifically told to adhere to their original views if they were convinced that the other members of the panel were wrong. This jury was not advised of its right to persevere in its convictions.

Here, in the second day of deliberation, this uncertain, confused jury was told to compromise its verdict. Such direction from a Federal bench dispelled the doubts and the uncertainty, and the jury promptly obeyed, with a compromise verdict.

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances could not be

ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Glasser* v. *United States*, 315 U. S. 60, 67.

This Court should clarify the effect of Rule 52 (b) upon Rule 30 by the application of the rule just cited.

CONCLUSION

The burden of proof question here presented is found also in *Remmer* v. *United States*, No. 304, wherein certiorari was recently granted. In addition, other serious questions of Federal Criminal Procedure, which are ripe for clarification from this Court, are presented in the instant case. Certiorari should be granted.

Respectfully submitted,

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